Supreme Court, U.S.
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Case No.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1994 TERM

J. Michael Hayfield and Ernest A. Husarik,
Petitioners

v.

Margaret McIntyre,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN ASSUMING THE EXISTENCE OF A CONSTITUTIONAL RIGHT NOTWITHSTANDING THAT THE RESPONDENT WAS ENGAGED IN CONCEDEDLY UNLAWFUL ACTIVITY AT THE TIME OF THE ALLEGED CONDUCT.

II. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY TO THE PETITIONERS IN A CASE THAT RECOGNIZED FOR THE FIRST TIME THE LEGAL RULES UPON WHICH THE ALLEGED LIABILITY IS BASED.

III. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY FOR A THREAT TO CALL THE POLICE WHERE PETITIONERS HAD PROBABLE CAUSE TO BELIEVE THAT UNLAWFUL ACTIVITY WAS AFOOT.

IV. DID THE COURT OF APPEALS ERR IN FINDING A CONSTITUTIONAL DEPRIVATION WHERE PETITIONERS ALLEGEDLY TOOK SOME BUT NOT ALL OF THE RESPONDENT'S LEAFLETS SUCH THAT RESPONDENT RETAINED

SUFFICIENT LEAFLETS TO ENGAGE IN UNLIMITED DISTRIBUTION.

V. DID THE COURT OF APPEALS ERR IN DENYING QUALIFIED IMMUNITY ON THE BASIS OF A HIGHLY ABSTRACT AND GENERAL FORMULATION OF THE ASSERTED RIGHT CONTRARY TO THIS COURT'S HOLDING IN ANDERSON V. CREIGHTON.

VI. DID THE COURT OF APPEALS ERR IN ITS APPLICATION OF THE PROPER STANDARD FOR SUMMARY JUDGMENT WHERE THE PETITIONERS PRODUCED AFFIRMATIVE EVIDENCE THAT THE RESPONDENT SUFFERED NO CHILLING IN FACT AND THUS CANNOT SHOW SHE SUFFERED ANY DEPRIVATION OF RIGHTS.

LIST OF PARTIES

Plaintiffs in the court below were Maureen Hansen, Margaret McIntyre, Gordon Rood, Carl Huffman, Carolyn Ward, Raymond L. Brown, Sr., Sue A. Bresee, Jerry D. Bresee, Lou Waggoner, Jack P. Keller, and Margie Bean.

Defendants in the court below were the Westerville City School District Board of Education, Debbie Collins, Don W. Miller, Donna Baker, Dave Coffman, Tom Fawcett, Ernest A. Husarik, J. Michael Hayfield, Richard Tiburzio, T. Smith, R. Bailey, P. Ross, and the City of Westerville.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 3

ARGUMENT 5

I. THE SIXTH CIRCUIT ERRED IN ASSUMING THAT THE RESPONDENT'S LEAFLETING ACTIVITY WAS CONSTITUTIONALLY PROTECTED 5

II. THE COURT ERRED IN DENYING DR. HUSARIK AND MR. HAYFIELD QUALIFIED IMMUNITY BECAUSE THIS CASE IS ONE OF FIRST IMPRESSION AND THE CONTOURS OF THE RIGHTS THEY ARE ALLEGED TO HAVE

VIOLATED WERE NEITHER CLEAR IN 1988 NOR FORESHADOWED BY RELEVANT CASE LAW 8

A. The Court Erred As A Matter Of Law In Determining That A Mere Threat To Call The Police Which Was Never Carried Out Is Sufficient To Cause A Deprivation Of Rights 10

B. The Court Erred In Determining That Petitioners Husarik and Hayfield Should Have Known That If They Took Any Of Respondent's Materials, They Were Violating Her First Amendment Rights 14

C. Petitioners Are Entitled To Qualified Immunity Becaue, At The Time Of The Alleged Incident, Respondent's Activity Was Unlawful Under Ohio Law 16

III. THE COURT BELOW MISCONSTRUED THIS COURT'S RULE ANNOUNCED IN ANDERSON V. CREIGHTON THAT CLEARLY ESTABLISHED RIGHTS ARE TO BE DETERMINED BY REFERENCE TO OPERATIVE FACTS UNDERLYING THE RELEVANT CLAIM FOR RELIEF 18

IV. UNDER THE APPLICABLE STANDARD FOR SUMMARY JUDGMENT, RESPONDENT CANNOT PREVAIL AT TRIAL ON HER CLAIM FOR AN ALLEGED 20

V. CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 640 (1987)8, 11, 15, 16, 17, 18, 19

Calhoun v. New York State Div. of Parole Officers, 999 F.2d 647, 654-55 (2d Cir. 1993) 8

Catalytic, Inc. v. Monmouth & Ocean City Bldg. Trade Council, 829 F.2d 430, 436 (3rd Cir. 1987) 6

Celotex Corp. v. Catrett, 477 U.S. 317, 331-32 (1986)..... 19

DiMeglio v. Haines, 45 F.3d 790, 795-97 (4th Cir. 1995) 7

Eckstein v. Cullen, 803 F. Supp. 1107, 1117 (E.D. Va. 1992)12

Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). 9

Farr v. Gruber, 950 F.2d 399, 401 (7th Cir. 1991) 18

Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir.), cert. denied, 423 U.S. 930 (1975) 13, 14

Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982) 9

Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir. 1991).. 12

Hansen v. Westerville City School District Board Of Education, Case No. C-2-89-6007 Feb. 19, 1993 1

Hansen v Westerville City School District Board Of Education, Case Nos. 93-3231/3303 Nov. 7, 1994..... 2

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) 8, 11

Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed. 2d 271 (1986) 15

McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E. 2d 152 (1993), cert. granted, 114 S. Ct. 1047, (Feb. 22, 1994), motion to dismiss denied, 114 S. Ct. 2670 (June 13, 1994) 4, 6, 14
Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992) 11, 17, 20
NAACP v. Button, 371 U.S. 415, 433 (1963) 9
Siegert v. Gilley, 500 U.S. 226 (1991) 5, 6
Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994) 9, 10, 11
State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922) 14
Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989) 18
Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) 6
Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J.) 8

OTHER AUTHORITIES

28 U.S.C. § 1331 2
42 U.S.C. § 1983 6
Federal Rules of Civil Procedure 56 18
Ohio Revised Code § 3599.09 ..... 4, 6, 13, 20

Case No.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1994 TERM

J. Michael Hayfield and Ernest A. Husarik,
Petitioners

v.

Margaret McIntyre,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 7, 1994.

OPINIONS BELOW

Hansen v. Westerville City School District Board Of Education, Case No. C-2-89-6007 Feb. 19, 1993 (Appendix A).

Hansen v. Westerville City School District Board Of Education, Case Nos. 93-3231/3303 Nov. 7, 1994 (Appendix B), Petition For Rehearing And Suggestion Of Rehearing En Banc denied Jan. 19, 1995 (Appendix C).

STATEMENT OF JURISDICTION

On November 7, 1994, the Sixth Circuit Court of Appeals entered a decision affirming in substantial part the decision of the lower court granting summary judgment in favor of the Westerville City School District Board of Education. The Sixth Circuit reversed that portion of the District Court's decision with respect to the Petitioners Dr. Ernest Husarik and J. Michael Hayfield in which the lower court concluded that: (1) Respondent McIntyre had no constitutionally protected right (2) her speech was not "chilled" in any way; and (3) that the Petitioners were entitled to qualified immunity. On January 19, 1995, the Sixth Circuit denied the Petitioners' Petition For Rehearing And Suggestion Of Rehearing En Banc.

This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. 1254(1).

Jurisdiction in the district court was proper pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Public officials, who are often called upon to exercise discretion in the execution of their official duties, must not be subjected to suit where they act in accordance with state law based upon a reasoned and accurate understanding of that law. This is especially true where, as here, their actions do not result in the deprivation of any right secured by the constitution. The decision of the Sixth Circuit Court of Appeals subjects the Petitioners to suit for their alleged interference with concededly unlawful activity. Further, without citation to any established precedent, it denied qualified immunity to Petitioners for allegedly taking several, but not all, of Respondent McIntyre's leaflets from her and for an alleged threat to report to the police conduct which Petitioners had reason to believe was unlawful, even though the police were never called, and despite the lack of evidence supporting Respondent's claim that, even assuming the existence of a constitutional right, she suffered a deprivation of her First Amendment rights.

Petitioners, Dr. Ernest Husarik and Mr. J. Michael Hayfield, are the Superintendent and the former (i.e., retired) Assistant Superintendent, respectively, of the Westerville, Ohio City School District. During 1988, the Westerville Board of Education had placed on the ballot the issue of an operating (tax) levy to support the public schools. On April 27 and 28, 1988, Dr. Husarik and Mr. Hayfield encountered Respondent, Margaret McIntyre, distributing leaflets in opposition to the levy. It is undisputed that Mr. Hayfield

read the leaflet and informed Respondent that it violated Ohio election laws. It is alleged that Mr. Hayfield took some of Respondent's leaflets and threatened to call the police. It is undisputed, however, that: (1) Respondent retained sufficient leaflets to continue her distribution that evening; (2) Respondent in fact continued to distribute leaflets that evening after the alleged incident; (3) the police were never called; (4) the Petitioners were without authority to effect an arrest and neither suggested they had such authority nor attempted to do so; (5) Respondent distributed leaflets the following evening; and (6) Respondent never refrained from engaging in any political activity as a result of the alleged conduct of Petitioners. It is also undisputed that Respondent's distribution of leaflets was subsequently determined by the Ohio Supreme Court to have violated Ohio Rev. Code § 3599.09. McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E. 2d 152 (1993), cert. granted, 114 S. Ct. 1047, (Feb. 22, 1994), motion to dismiss denied, 114 S. Ct. 2670 (June 13, 1994). The constitutionality of the Ohio statute is currently being considered by this Court and a ruling is expected shortly.

Despite these undisputed facts, the pendency of McIntyre v. Ohio Elections Comm'n before this Court, and over a strong dissent by Judge Batchelder, the Sixth Circuit Court of Appeals denied Petitioners' claim of qualified immunity, apparently assuming that the Respondent was engaged in constitutionally-protected conduct, and ruled that a question of fact exists whether the Respondent's free speech rights were in fact chilled, i.e., whether she suffered a

deprivation of First Amendment rights. Slip Op. at 18, 19. It is respectfully submitted that the Court's (i.e., majority's) decision is erroneous because: (1) it concluded that dissemination of literature in violation of state election law is protected activity; (2) it incorrectly applied the applicable standard for qualified immunity; (3) it denied Petitioners qualified immunity from suit with regard to rights first recognized in the instant decision of the Sixth Circuit Court of Appeals; and (4) improperly applied the standard for summary judgment.

ARGUMENT

I. The Sixth Circuit Erred In Assuming That The Respondent's Leafleting Activity Was Constitutionally Protected.

The Court's consideration and denial of qualified immunity to Dr. Husarik and Mr. Hayfield is erroneous because Petitioners' alleged activities did not deprive Respondent of any right secured under the Constitution. In Siegert v. Gilley, 500 U.S. 226 (1991), this Court ruled that the District Court for the District of Columbia erred in even reaching the issue of qualified immunity where it erroneously assumed the existence of a constitutional violation. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Id. at 232. Failure to make

this threshold showing means that a plaintiff loses at an "analytically earlier stage of the inquiry into qualified immunity," thus obviating the need even to consider the issue of qualified immunity. Id. at 227.

In this case, the Sixth Circuit failed to consider or discuss that, according to the Ohio Supreme Court, Ms. McIntyre's conduct violated Ohio Rev. Code § 3599.09 at the time of the alleged interference with her distribution of election materials. See McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E.2d 152 (1993). Federal courts of appeal have held that unlawful conduct is not constitutionally protected merely by virtue of the fact that the unlawful activities involved elements of speech.[1] Should this Court uphold the validity of the Ohio statute under the Constitution, then the Respondent's conduct will be deemed to have been unlawful. Yet the Sixth Circuit decision will force the Petitioners to stand trial and face potential personal liability for their alleged interference with the Respondent's unlawful conduct. Unlawful conduct is not constitutionally protected and cannot, therefore, provide a basis for § 1983 liability. Cf. Siegert v. Gilley, 500 U.S. 226 (1991). Therefore, should this Court rule in McIntyre v. Ohio Elections Comm'n that the Ohio statute is constitutional, then the Respondent's prima facie case under § 1983 will fail. Under such circumstances, summary reversal of the Sixth

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[1] See, e.g., Catalytic, Inc. v. Monmouth & Ocean City Bldg. Trade Council, 829 F.2d 430, 436 (3rd Cir. 1987) (no First Amendment protection for union's leafleting activities in violation of NLRA); Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) (no First Amendment protection for violation of federal tax laws).

Circuit's decision is proper. Otherwise, the Respondent may obtain a damage award against the Petitioners for their alleged interference with her unlawful conduct. Accordingly, this Court should grant this Petition to review the Sixth Circuit's failure to apply Siegert and to clarify the evident confusion within the federal circuits as to the proper application of the standard as set forth in that case. See DiMeglio v. Haines, 45 F.3d 790, 795-97 (4th Cir. 1995) (collecting cases reflecting split within the circuits).

II. The Court Erred in Denying Dr. Husarik and Mr. Hayfield Qualified Immunity Because This Case Is One Of First Impression And The Contours Of The Rights They Are Alleged To Have Violated Were Neither Clear In 1988 Nor Foreshadowed By Relevant Case Law.

Even if this Court does strike down the Ohio statute, the Sixth Circuit's decision reversing the District Court's order granting summary judgment to Dr. Husarik and Mr. Hayfield on the issue of qualified immunity is erroneous because this case is one of first impression; the Sixth Circuit's opinion effectively recognizes new federal rights for the first time while at the same time denies Petitioners qualified immunity because of their failure to anticipate the announcement of those rights.

This Court has held that whether a public official is protected by qualified immunity generally depends upon the objective legal reasonableness of the action in question

assessed in light of the legal rules that were "clearly established" at the time it was taken. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be forced to 'know' that the law forbade conduct not previously identified as unlawful." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, "[t]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "If there is a 'legitimate question' as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity." Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J.).

Other circuits recognize that qualified immunity should be applied in cases of first impression. Where a legal rule is applied in case for the first time it cannot be clearly established at the time the alleged conduct took place. Calhoun v. New York State Div. of Parole Officers, 999 F.2d 647, 654-55 (2d Cir. 1993). For the reasons set forth below, the Petitioners respectfully request that this Court grant the Petition to resolve the evident conflict between the Sixth and Second Circuits.

A. The Court Erred As A Matter Of Law In Determining That A Mere Threat To Call The Police Which Was Never Carried Out Is Sufficient To Cause A Deprivation Of Rights.

The Sixth Circuit creates for the first time the possibility of liability for a public official for merely threatening to call the police if the official's purpose in so doing was to discourage someone from expressing his or her views, notwithstanding that the official had probable cause to believe, and in fact correctly believed that illegal conduct was afoot. Slip Op. at 18-19, citing NAACP v. Button, 371 U.S. 415, 433 (1963) and Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994). As Judge Batchelder in her dissenting opinion below cogently points out, the cases cited in the Majority's opinion do not involve a mere threat to call the police which is never carried out. Dissenting Opinion at 1-3.[2]

Yet none of the cases relied upon by the Sixth Circuit clearly establish that a threat under such circumstances violates any constitutional right. NAACP v. Button involved a challenge to a Virginia statute on the basis that it was overly broad and vague, potentially inhibiting the plaintiffs' First Amendment freedoms of speech, association, petition and assembly. The alleged threat in the instant case to call the police, which threat was never carried out, clearly does not present the inhibitory effect of the overbroad and vague statute in Button. Particularly for the purposes of

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[2] To the contrary, courts have recognized that a mere threat by a police officer that he was "going to get" a plaintiff -- a seemingly more egregious "threat" -- is insufficient to state a claim for a violation of the plaintiff's constitutional rights. See Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (affirming decision granting summary judgment to defendants); cf. Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982) (rejecting claim based upon a prosecutor's sending of a letter informing plaintiff (an attorney) that his advertising appeared to contravene state law, noting that "[t]he prosecutor's action here can be characterized at most as a warning or a threat") (emphasis supplied).

determining the issue of qualified immunity, it is not apparent that a reasonable public official in the position of Dr. Husarik and Mr. Hayfield would recognize that the evils associated with the statute struck down in Button were inherent in their alleged threat to call the police concerning Respondent's distribution of campaign materials which Petitioners had reason to believe violated Ohio law.

Nor does Sloman v. Tadlock support the denial of qualified immunity to Dr. Husarik and Mr. Hayfield in this case. In Sloman, the plaintiff established that a police officer, after warning the plaintiff that he was in violation of the traffic laws, subsequently issued a citation to plaintiff for that violation and later participated in the arrest of the plaintiff for trespass. One of the defendants in Sloman was a police officer, an official who had it within his power to arrest or issue citations to the plaintiff. In the instant matter, it is undisputed that neither Dr. Husarik nor Mr. Hayfield had the ability to arrest or cite Respondent for an election law violation, or indeed, any other violation of law. Further, the police officer in Sloman actually cited plaintiff for a violation of law and later participated in the plaintiff's arrest, and the civilian defendant in that case actually had signed a citizen's complaint that led to the arrest of the plaintiff. See Sloman, 21 F.3d at 1465-66, 1474. Here, by contrast, the record demonstrates unequivocally that Petitioners never called the police concerning Respondent's activities.[3]

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[3] Additional evidence established in Sloman serves to distinguish it from the case at bar. In Sloman, there was evidence presented that the plaintiff was not violating the traffic laws for which he was issued a

Moreover, even if Sloman provided support for the court's decision, it was decided in 1994. The relevant inquiry here, however, is whether the law in 1988 was such that the Petitioners should have known that they were violating the Respondent's clearly established rights. Thus, the decision below is contrary to this Court's pronouncements in Harlow v. Fitzgerald and Anderson v. Creighton.

The Sixth Circuit's decision to deny qualified immunity under the circumstances of this case is particularly incongruous in light of the result in a case upon which it relied, Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992), in which an official who had not merely "threatened to call the police" but had instituted a prosecution against an individual allegedly in retaliation for his exercise of First Amendment rights was granted qualified immunity.

As Judge Batchelder notes in her dissent, "...a threat to call the police, even when made by public school officials on public school property, is [not] the equivalent to a threat of arrest or prosecution, such that these [school officials] should have known that when they threatened to call the police they were violating [Respondent's] First Amendment rights." Dissenting Opinion at 4. A rule of law that would

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citation by the defendant police officer, and further, that the trespass charge against the plaintiff was groundless. Here, it is undisputed that Respondent subsequently was adjudged by the Ohio Supreme Court to have violated the Ohio election laws. Finally, unlike Sloman, there is no evidence in this matter that Respondent's expression was "chilled" by Petitioners' alleged conduct. Cf. Sloman, 21 F.3d at 1470.

deny qualified immunity to school officials under these circumstances indeed "set[s] an alarming precedent," Dissenting Opinion at 4, for it creates a new rule of liability for merely threatening to call the police while denying public officials qualified immunity for not anticipating the new rule's announcement by this Court.[4]

Federal courts have generally granted qualified immunity in cases of first impression. See, e.g., Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir. 1991) ("the law of qualified immunity, as it has developed in this circuit, has tended to find qualified immunity in almost every case of first impression.") (Cudahy, J., concurring). The Sixth Circuit's failure to recognize that novel legal issues are peculiarly appropriate for the granting of qualified immunity is at odds with the cases from this Court as well as in other circuits.

B. The Court Erred In Determining That Petitioners Husarik And Hayfield Should Have Known That If They Took Any Of Respondent's Materials, They Were Violating Her First Amendment Rights.

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[4] Moreover, as a matter of public policy, public officials, especially school officials, cannot be subject to § 1983 liability each time they threaten to invoke the proper civil authority when they reasonably and correctly believe that illegal conduct is afoot. See, e.g., Eckstein v. Cullen, 803 F. Supp. 1107, 1117 (E.D. Va. 1992) (threat by prosecutor to invoke judicial intervention not violative of First Amendment rights of bookstore owner).

As Judge Batchelder emphasizes in her dissenting opinion, there is no precedent which would support a denial of qualified immunity to Dr. Husarik and Mr. Hayfield on the theory that they should have known that by taking some of Respondent's materials they were violating her First Amendment rights. Dissenting Opinion, at 4.[5]

The court below analogized the facts of this case to those presented in Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir.), cert. denied, 423 U.S. 930 (1975). In Glasson, a police officer, pursuant to a departmental policy to confiscate and destroy all signs which the police deemed to be "detrimental" or "injurious" to the President or to the United States, seized a poster critical of the President and destroyed it. Unlike the facts in the instant matter, the police officer in Glasson destroyed the plaintiff's only poster, which effectively prevented her from communicating her message to those in attendance at the President's motorcade. Here, at most, Petitioner Hayfield is alleged to have taken only a few of Respondent's leaflets, and it is undisputed that Respondent continued to pass out her leaflets to other passersby on the two dates in question. It also bears emphasis that in Glasson, the law enforcement officer who destroyed the plaintiff's poster would have had the power to arrest her if she resisted his actions, while in the instant matter, Petitioner Hayfield had no such authority, and indeed never even called the police concerning Respondent's activity. See also Dissenting Opinion at 2.

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[5] There is no record evidence that Petitioner Dr. Husarik ever took any of Respondent's leaflets.

Glasson, the very precedent which the Court cites in support of its conclusion that there was a "clearly established" right of Respondent not to have any of her materials taken such that Petitioners Hayfield and Husarik should have known that their conduct in 1988 was unlawful, fails to inform the reader that public officials could be held liable for taking only a few of an individual's materials and the individual is not prevented from communicating her message to the public.

C. Petitioners Are Entitled To Qualified Immunity Because, At The Time Of The Alleged Incident, Respondent's Activity Was Unlawful Under Ohio Law.

Under Ohio law as it existed in 1988, and as of this filing, the Respondent's conduct was unlawful. In State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922), the Ohio Supreme Court stated that the substantially identical precursor to Ohio Rev. Code § 3599.09 "in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights [i.e., the Ohio Constitution's First Amendment analogue] but is regulatory in nature, and intended to prevent abuse of the right." This conclusion was confirmed by the Ohio Supreme Court's reaffirmation of this controlling law by a 6 to 1 margin in McIntyre v. Ohio Elections Comm'n., 67 Ohio St. 3d 391, 618 N.E.2d 152 (1993). Because clearly established state law did not confer any right upon the Petitioner in 1988,

it is plainly unfair to subject the Respondents to potential liability for subsequent changes in the law which could not have been foreseen. Thus, if the Ohio statute is now struck down, Dr. Husarik and Mr. Hayfield may be held to answer in damages for a change in the law occurring some seven years after the alleged incident.

This result is especially unjust given that, at the time it occurred, the Petitioners acted in accordance with an accurate understanding of the law as it then existed. Qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed. 2d 271 (1986). Ironically, the Sixth Circuit's decision would deny immunity to these Petitioners not because they knew too little, but rather because they knew too much. To impose liability on them based on their accurate knowledge of the law imposes an intolerable burden on public officials. Accordingly, the denial of qualified immunity to Mr. Hayfield and Dr. Husarik, when they certainly had reasonable grounds to believe that Respondent's materials violate the election laws, flatly contradicts the rule pronounced in Anderson v. Creighton.

III. The Court Below Misconstrued This Court's Rule Announced In Anderson v. Creighton That Clearly Established Rights Are To Be Determined By Reference To Operative Facts Underlying The Relevant Claim For Relief.

This Court warns against applying the test of what is "clearly established law" in terms that are too general or abstract, noting that such a formulation will "convert the law of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging extremely abstract rights." Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). The problem with such an approach is that it tends to "destroy 'the balance that [the Supreme Court] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" Id at 639 (citations omitted). For this reason, federal law concerning qualified immunity requires that "the right alleged to have been violated must have been 'clearly established' in a more particularized, and hence more relevant sense." Id. at 640.

The Sixth Circuit, though, framed the issue respecting qualified immunity in very general terms, as follows:

> Mrs. McIntyre's right to distribute political literature was clearly established at the time of these events. A reasonable school official would have known that he could not interfere with a citizen's campaign efforts against a tax levy by confiscating her materials and threatening to call the police.

Opinion at 19. Posed in that manner, "the question answers itself." Compare Mozzochi v. Borden, 959 F.2d 1174, 1178 (2d Cir. 1992) (concluding that a similarly worded framing of the issues was too general). Instead, the relevant standard must account for the fact that the materials which Respondent was distributing were clearly in violation of the state election laws as they existed at that time.

Additionally, as this Court has recognized, whether the official's actions are objectively reasonable is determined by reference to federal constitutional, statutory or case law existing at the time the alleged violation occurred, including decisions of the Supreme Court, the Sixth Circuit Court of Appeals, or the Ohio Supreme Court. Anderson v. Creighton, 483 U.S. 635, 639. Although it is not required that the "action in question [be] previously held unlawful," its unlawfulness in light of pre-existing law must be apparent, and the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the law." Id. at 640.

For the foregoing reasons, the issue respecting qualified immunity should have been framed as follows: whether, in 1988, it was clearly established that an individual had a First Amendment right to disseminate materials which violated state election laws, and, even if such a right is determined to have existed, whether a reasonable school official would have known that taking several copies of the individual's materials and threatening to call the police, even when there was no deterrent effect on the individual's speech,

the individual's medium of speech was not impaired, and police were not contacted, would violate the individual's rights. Dr. Husarik and Mr. Hayfield respectfully urge this Court to find that such a right was not clearly established in 1988, and that in any event, reasonable public officials would not reasonably have known that the conduct at issue in this case violated such a right. In addition, the Petitioners respectfully request that the Court grant their Petition to clarify the rule as set forth in Anderson v. Creighton

IV. Under The Applicable Standard For Summary Judgment, Respondent Cannot Prevail At Trial On Her Claim For An Alleged "Chilling" Of Her First Amendment Rights.

Even if Respondent had First Amendment rights in this case, and even if qualified immunity were not properly invoked in this case, the Sixth Circuit improperly applied the applicable standard for summary judgment in failing to uphold dismissal of Respondent's claims. The Sixth Circuit reversed the District Court and ruled that an issue of fact remains concerning whether Petitioners' conduct deprived Respondent of a constitutionally protected right. Slip Op. at 18. The Court correctly noted that "in order to succeed at trial . . . [the Respondent] will have to establish that her expression was in fact deterred or chilled by the defendants' conduct." Slip Op. at 19 (emphasis added).[6] Under Fed. R. Civ. P. 56, a nonmovant must " 'present affirmative evidence to defeat a properly supported motion for summary

[6] Accord, Farr v. Gruber, 950 F.2d 399, 401 (7th Cir. 1991); Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989).

judgment"; self-serving, unsupported allegations are insufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). A movant may support a motion under Rule 56 by pointing out to the trial court that, after a sufficient period for discovery, the plaintiff has no evidence to support an essential element of his or her case. Celotex Corp. v. Catrett, 477 U.S. 317, 331-32 (1986).

In the District Court, Petitioners demonstrated that Respondent had presented no evidence to support a finding that her First Amendment rights were in fact chilled. Specifically, Respondent testified that (1) she continued handing out all of her leaflets on April 27 and 28, 1988, (McIntyre Dep. at I-97-98); (2) she continued campaigning vigorously in opposition to the tax levies, (id. at I-120-22, 131, III-24); (3) she actively attended board meetings (id. at I-120); and (4) she even ran twice for a seat on the Westerville School Board. (Id. at IV-14-15.) Indeed, she admitted:

> Q: Is there anything that you didn't do; anything you said, "Well, gee, I'd like to do this," or "I should do this," or "I usually do this, but I'm not going to do that now because I feel threatened because of what Husarik and/or Hayfield did to me on April 27th and 28th, 1988"?
>
> A: Not to my knowledge.

(Id. at I-122) (attached hereto as Appendix D). Respondent failed to cite, either in the District Court or before the Sixth Circuit, any record evidence to refute this unequivocal admission that her First Amendment rights were never chilled. Cf. Mozzochi v. Borden, 959 F.2d at 1178-79 (no evidence that plaintiff's speech activities were "chilled" when they continued unabated after his arrest and criminal prosecution). Indeed, there is no such evidence, nor will any be adduced at trial, given the fact that Respondent is now deceased and there is no other source of admissible evidence to establish "chilling" in fact. The complete failure of evidence on an essential element of Respondent's case required the Sixth Circuit, under binding Supreme Court precedent, to affirm the District Court's order granting summary judgment to Petitioner on this claim.

Additionally, the record evidence does not support any claim that Dr. Husarik ever confiscated Respondent's leaflets. To the contrary, Respondent alleged that only Mr. Hayfield took materials from her. Specifically, Respondent asserted that Mr. Hayfield "grabbed" leaflets on April 27, 1988, but not the following night, and that the Petitioners "attempted" to "confiscate" her leaflets the following night when "they asked me to give them to them." (McIntyre Dep. at III-84-85) (Appendix D). It is manifest that merely asking for materials does not constitute confiscation. Accordingly, the undisputed record evidence requires that the District Court's order granting summary judgment for lack of injury in fact to Respondent must be reinstated.

V. CONCLUSION

For the reasons set forth in this brief, Petitioners Dr. Ernest Husarik and Mr. J. Michael Hayfield, respectfully request that, if the constitutionality of Ohio Rev. Code § 3599.09, is affirmed, the Court summarily reverse the decision of the Sixth Circuit and remand this case for entry of judgment in conformity with the decision of the District Court. In the alternative, it is respectfully submitted that qualified immunity should be granted to Dr. Husarik and Mr. Hayfield and the order of the District Court granting summary judgment to Petitioners on Respondent's " chilling" claim should be affirmed on the basis that the Respondent failed to make the requisite showing in support of her claim. Accordingly, Dr. Husarik and Mr. Hayfield request this Court to grant their Petition and to affirm the District Court's order granting summary judgment on the issues of qualified immunity and on Respondent's "chilling" claim.

Respectfully submitted,

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